IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 17TH SEPTEMBER 2007 / 26TH BHADRA 1929

CRL.A.No. 1277 of 2007

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SC.789/2002 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE (ABKARI CASES), KOTTARAKKARA.

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APPELLANT:

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SUKUMARAN @ KURUP, S/O.AYYAPPAN,
CONVICT NO.1851, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. C.T.JESTIN[STATE BRIEF]

RESPONDENT:

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STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
OF THE HON'BLE HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1277 of 2007

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Dated this the 17th day of September, 2007

JUDMENT

The appellant, accused in S.C.No.789/2002 on the file of the Court of the Addl. Sessions Judge (Abkari Cases), Kottarakkara, was charge-sheeted for the offence punishable under section 55(a) and (i) of the Abkari Act on the allegation that he was found in possession of 2 ½ litres of arrack for sale. To prove the charge against the appellant, the prosecution examined four witnesses and relied Exts.P1 to P5 and MOI and MOII. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the commission of offence alleged against him. He stated that he was innocent and he was arrested from his house and the case was foisted against him by the police due to the instigation of the owner of the rubber estate who was keeping political animosity towards him. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for two years and to pay a fine of Rs.1,00,000/- and in

default to undergo simple imprisonment for six months. The benefit of section 428 Cr.P.C. was also allowed. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. Since the appeal is filed through the jail authorities and no counsel has been appointed to defend the case of the appellant, a counsel from the State Brief Panel has been appointed to defend the cases of the appellant.

3. Heard.

4. Learned counsel for the appellant contends that the trial court went wrong in placing reliance on the prosecution witnesses to find the appellant guilty of the charge, as there is no independent evidence to support the prosecution case. It is also contended that the trial court ought not have found that the appellant guilty under section 55(a) of the Abkari Act in the light of the dictum laid down by this Court in decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 63. It is further contended that the trial court ought to have found that the evidence of PWs.2 and 3 would not prove beyond reasonable that the appellant was found in possession of the material objects, as the prosecution has not adduced any evidence to prove that they were seized from the appellant as alleged by the prosecution.

5. Before considering the contentions raised, a question to be considered by this Court as to whether evidence of Pws.2 and 3 can be accepted to prove the charge against the appellant or not?

6. PW3 Asst. Sub Inspector of Police, who detected the offence, stated that on 22-7-2000 in the evening while he was on law and order duty along with PW2 and others, he got information that the appellant engaged in the sale of arrack by standing in the rubber plantation owned by one Sivan Pillai. They went to the place of occurrence. They saw the appellant standing in the rubber plantation by holding MOs. I and II and on seeing the police party, he attempted to ran away. He was intercepted and questioned. He also stated that he examined MO1 can in the presence of witnesses and it contained 2 ½ litres of arrack. He further stated that he seized the contraband articles under Ext.P1 mahazar and samples were taken for analysis. He sated that the appellant was arrested from the spot. He also stated that the appellant and the contraband article were taken to the police station and registered the crime. PW2 who accompanied PW3 had given evidence in support of PW3. The evidence of Pws.2 and 3 has been accepted by the trial court to prove the charge against the appellant. PW1 the only independent witness did not support the prosecution case. In this context, the case set up by the appellant under section 313 Cr.P.C. requires

to be considered by this Court. The case of the appellant was that he was innocent and the case was foisted against him at the instigation of the owner of the rubber estate and no material object was seized from him as alleged by the prosecution.

7. When MO.I was produced before the Court, no seal or label is seen affixed on it. In this context, the evidence of PW4 who filed the charge is relevant. When a specific question was put to him regarding the seal, he stated that he had verified the seal. However, in the cross-examination he stated that he was not in a position to identify the seal alleged to be made by PW3. Further it has to be noted that the crime was detected on 22-7-2000, but the residue and the sample were produced before the court as per Ext.P4 production list only on 27-7-2000. No satisfactory explanation was given for the delay. As per the principles laid down by this Court in a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725, the prosecution has not proved that residue and sample were kept in the proper custody till those items were produced before the court, chance of tampering cannot be ruled out. In the light of the specific case set up by the appellant in section 313 statement, the prosecution ought to have given explanation for the delay occurred in producing the residue and sample before the court. Though PW3 had stated that he kept the sample and the

residue at the station in safe custody, no explanation was given regarding the delay. In the above circumstances, the evidence of PWs.1 to 3 cannot be accepted to prove that the appellant was found in possession of the contraband article.

8. The learned counsel for the appellant raised the contention that PW3 who detected the offence was not an authorized officer to detect or investigate the offence under the provisions of the Abkari Act . As per Section 4 of the Abkari Act, the Government of Kerala is empowered to authorize an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act . As per the notification G.O.(P) No.69/96/TD dated 29-3-1996 (S.R.O. No.321/96), all police officers of an above the rank of Sub Inspector of Police in charge of Law and Order and working in the General Executive Branch of the Police Department and all Revenue Officers of an above the rank of Deputy Collectors to be the authorized officers. PW3 who detected the offence was the Asst. Sub Inspector of Police, Pathanapuram at the relevant time. If that be so, the detection of the offence and the investigation of the same by him is prejudicial to the appellant. Hence, the finding of the trial court is not sustainable in law.

9. The next question to be considered is that the appellant had committed an offence under section 55(a) of the Abkari Act. As per the principles laid down by this Court in the decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631), an offence under section 55(a) of the Abkari Act is attracate , the prosecution should specifically allege and prove that the contraband articles found in the possession of the accused were in connection with export, import, transport or transit. The prosecution case is that the appellant was found in possession of 2 ½ of arrack. There is no evidence to show that the possession was in connection with any export, import or transport or transit. The further prosecution case is that the appellant was found in selling arrack at the rubber estate and MO.II glass was also recovered. However, the prosecution has failed to adduce evidence to show that the appellant was selling arrack to anybody. If that be so, the finding of the trial court that the appellant has committed an offence under section 55(a) of the Abkari Act is also not sustainable in law.

10. In the above circumstances, this Court is of the view that the evidence adduced by the prosecution is not sufficient to prove the case against the appellant. Hence, the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

11. In the result, the conviction and sentence awarded against the appellant/accused in S.C.No.789/2002 on the file of the Addl. Sessions Judge (Abkari Cases) Kottarakkara are set aside and the appellant is acquitted. Hence, the appellant shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

**K. Thankappan,J.**

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**Crl.A. No. 1277/2007**

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**Judgment**

**17-9-2007**